

## Recent Trends in Criminal Law Reform

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### Résumé de l'article

Les réformes législatives, judiciaires et administratives entreprises récemment en matière criminelle témoignent d'efforts croissants pour rendre le système de justice criminelle plus équitable et plus efficace. On a pu noter une protection accrue des droits individuels, un intérêt renouvelé pour la déjudiciarisation et pour les modes alternatifs de résolution des conflits ainsi qu'un effort de rationalisation du processus pénal qui s'est concrétisé par la réforme des tribunaux judiciaires, l'établissement d'une politique de gestion judiciaire des dossiers et la simplification de la procédure criminelle. De même, le système a fait preuve d'une plus grande ouverture à l'égard des nouvelles technologies. Même si, à première vue, les concepts d'équité et d'efficacité semblent s'opposer, ils constituent en fait deux attributs nécessaires et complémentaires du système de justice criminelle.

## Recent Trends in Criminal Law Reform

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*A review of recent legislative, judicial and administrative reforms in criminal matters shows an increased thrust toward greater fairness and efficiency of the criminal justice system. This has materialized in an increased protection of individual rights, a renewed interest in diversion and alternative dispute resolution mechanisms, a streamlining of the process through court reform, caseload management and a simplification of the criminal procedure and a greater openness to the use of new technology. Although contradictory at first sight, efficiency and fairness are two necessary and complementary attributes of the criminal justice system.*

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The last few years have revealed two parallel trends in criminal law reform : one, toward an increased protection of the rights of the individual ; the other, toward a more efficient functioning of the criminal justice system. The two trends have emerged through judicial, legislative and administrative reforms.

This simultaneous thrust toward greater fairness and increased efficiency may seem, at first glance, to be contradictory. How can a system concerned with promoting efficiency also ensure fairness ? In reviewing the elements of these recent reforms, it will appear that fairness and efficiency are not only not incompatible but in fact must go hand in hand in order for either set of reforms to be successful.

## **1. Increased Protection of Individual Rights**

### **1.1 Rights of the Accused**

While the United States Supreme Court in some cases is backing away from the protection of individual rights in favour of increasing the law enforcement power of the state<sup>1</sup>, the Supreme Court of Canada, using the *Canadian Charter of Rights and Freedoms*, has been increasingly protecting the rights of the individual from undue encroachment by agents of

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1. For example, in *Horton v. California*, 110 S.Ct. 2301 (1990), the Court extended police powers of seizure by holding that inadvertence is *not* a requirement of the plain view doctrine. Justice Stevens found that the inadvertence requirement is not necessary to prevent searches from becoming general searches.

the state. Supreme Court decisions in the last two years alone show a consistent trend toward elaborating and strengthening the rights of the accused.

In the case of *R. v. Hebert*<sup>2</sup>, the court addressed the following question: where the police use deception to elicit a statement from an accused who has already expressly chosen not to speak to police, is the accused's right to silence, as protected by s. 7, violated? The court ruled that it is, while at the same time the United States Supreme Court, backing away from its previous position, decided that there was no need for a formal warning in those circumstances under that country's Constitution<sup>3</sup>.

The deciding factor for the Supreme Court of Canada was the fact that the police deliberately practised deception and actively elicited a statement from the accused rather than just observing him. This behaviour was exacerbated by the fact that the statement so elicited was the only evidence against the accused. The admission of this evidence would render the trial unfair because, as Madam Justice McLachlin put it, the accused was:

conscripted to give evidence against himself after clearly electing not to do so by use of an unfair trick practised by the authorities, and where the resultant statement is the only evidence against him, one must surely conclude that reception of the evidence would render the trial unfair<sup>4</sup>.

Not only did the deceptive police practice violate the accused's right to silence, it could not be saved by s. 1. Most importantly, the evidence so obtained could not be used as part of the case against the accused because its admission would bring the administration of justice into disrepute.

A few months later, the Supreme Court fortified its protection of the right to silence in *R. v. Chambers*<sup>5</sup>. This case did not involve police procedure but rather, the conduct of the Crown at trial.

The main issue before the Supreme Court was whether the trial judge had erred in allowing the Crown to cross-examine the accused as to why he did not make an exculpatory statement to the authorities upon his arrest or at any time prior to trial<sup>6</sup>.

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2. *R. v. Hebert*, (1990) 57 C.C.C. (3d) 1 (S.C.C.).

3. *Illinois v. Perkins*, (1990) W.L. 71443 (U.S.S.C.).

4. *R. v. Hebert*, *supra*, note 2, 44.

5. *R. v. Chambers*, (1990) 59 C.C.C. (3d) 321 (S.C.C.).

6. In fact, the trial judge, at the insistence of counsel for the defence, undertook to instruct the jury as to the very limited use they could make of that evidence. As a result of that undertaking, the defence did not lead evidence that the accused had indeed provided an exculpatory explanation of his actions to his own counsel long before the trial, which would have undermined the Crown's argument that the accused's defence was a « recent concoction ». In his charge to the jury, however, the trial judge failed to instruct them on this issue.

Cory J., speaking for a majority of the court (six of seven judges) noted that it is « well recognized that there is a right to silence which can properly be exercised by an accused person in the investigative stages of the proceedings<sup>7</sup> ».

The trial judge's failure to warn the jury against drawing an adverse inference from the accused's exercise of his right not to offer his defence to the authorities during their investigation caused « irreparable damage » to the defence. As there was no relevant basis for the Crown's questions in this area, they « were improper and the evidence inadmissible<sup>8</sup> ». The court found there had been a serious miscarriage of justice and ordered a new trial.

In order for accused persons to benefit from their right to make full answer and defence, the Supreme Court has ruled unanimously that the Crown has an obligation to disclose the fruits of its investigation<sup>9</sup>. What the Crown discovers in the course of its investigation is public property and is to be used not to secure a conviction, but to ensure that justice is done<sup>10</sup>. After a review of the pros and cons of disclosure by the Crown, Sopinka J. for the court concluded that « there is no valid practical reason to support the position of the opponents of a broad duty of disclosure<sup>11</sup> ». He cited in particular the « overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence<sup>12</sup> ».

The Supreme Court also manifested concern for the accused's right to make full answer and defence in *R. v. Seaboyer*<sup>13</sup>. The accused attacked the constitutionality of ss. 276-277 of the Criminal Code, the so-called rape shield provisions enacted in 1985. Section 276 prohibited a person accused of sexual assault from adducing evidence of the complainant's sexual activity with anyone other than the accused, subject only to three exceptions. Section 277 provided that evidence of sexual reputation is not admissible for the purpose of challenging or supporting the complainant's credibility. The issue before the court was whether these restrictions offended guarantees afforded to the accused under the Charter, specifically under ss. 7 and 11(d) (the presumption of innocence).

A minority of the court (two of nine judges) would have upheld both provisions. The majority, while agreeing that these provisions had « laud-

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7. *R. v. Chambers*, *supra*, note 5, 340.

8. *Id.*, 342.

9. *R. v. Stinchcombe*, (1991) 68 C.C.C. (3d) 1 (S.C.C.).

10. *Id.*, 7.

11. *Id.*, 9.

12. *Ibid.*

13. *R. v. Seaboyer*, (1991) 66 C.C.C. (3d) 321 (S.C.C.).

able goals » (to avoid unprobative and misleading evidence, to encourage the reporting of sexual assault and to protect the security and privacy of witnesses), was concerned about their effect<sup>14</sup>. As Madam Justice McLachlin put it, writing for the majority : « The right of the innocent not to be convicted is dependent on the right to present full answer and defence<sup>15</sup>. »

The majority found that s. 277 (basing the complainant's credibility on sexual reputation) does not offend the Charter. After considering the defences that an accused might be precluded from making due to the restrictions in s. 276 however, the majority concluded that this provision infringes the rights in ss. 7 and 11(d) of the Charter and is not saved by s. 1. McLachlin J. stated :

In achieving its purpose—the abolition of the outmoded, sexistbased use of sexual conduct evidence—it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for the elimination of the possibility that the judge may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent<sup>16</sup>.

Later on, we shall see how the court's suggestions and the government's subsequent draft legislation try to strike a balance between the rights of the accused and the protection of the complainant.

The Supreme Court explored another aspect of the right of the accused to make full answer and defence (as protected by s. 7 of the Charter) in a series of cases<sup>17</sup> dealing with access by an accused to the information on the basis of which a wiretap has been authorized. In *Dersch*, the court considered whether an accused is required to show *prima facie* misconduct by the party who applied for the wiretap authorization, in order to be granted access to the affidavit filed in support of the application. In effect, because the contents of the authorization packet are not accessible to the public, it was virtually impossible for an accused to demonstrate such misconduct.

A majority of the court concluded that it is sufficient for an accused to assert that admission of the evidence obtained by wiretap is challenged and that access to the sealed authorization packet is required to permit full

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14. *Id.*, 387.

15. *Id.*, 389.

16. *Id.*, 402.

17. *Dersch v. A.G. Canada*, (1990) 60 C.C.C. (3d) 132 (S.C.C.); *R. v. Garofoli*, (1990) 60 C.C.C. (3d) 161 (S.C.C.); *R. v. Zito*, (1990) 60 C.C.C. (3d) 216 (S.C.C.); *R. v. La-chance*, (1990) 60 C.C.C. (3d) 449 (S.C.C.).

answer and defence<sup>18</sup>. The rationale for this is that only on the basis of the information in the packet can an accused move to have the wiretap authorization set aside.

Similarly, the court in *Garofoli* and *Lachance* loosened the restrictions on the ability of an accused to cross-examine the affiant. The majority held that cross-examination should be permitted on leave where the accused can show that it will generate testimony relating to the validity of the authorization.

It should be noted that these judicial reforms regarding access to wiretap authorizations apply only to accused persons and not to other citizens who may be the subject of a wiretap.

Another fundamental right of the accused is the right to control his or her own defence. This right is jeopardized when the Crown is permitted to raise a defence on behalf of the accused, against the wishes of the accused. The Supreme Court addressed this issue in *R. v. Swain*<sup>19</sup>. The accused challenged the constitutionality of the common law rule which permitted the Crown to adduce evidence of an accused's insanity at trial, even where the accused did not wish to raise insanity as a defence.

Writing for the majority, Lamer C.J.C. held that where the Crown raises the issue of insanity, the liberty of the accused is imperilled, so s. 7 may be invoked. When an accused has been found fit to stand trial, he is by definition fit to conduct his own defence. In other words, he is not insane at the time of the trial. The Crown's ability at trial to raise evidence of the accused's insanity at the time the offence was committed interferes with the accused's control over the conduct of his defence<sup>20</sup>. It can result in the presentation of contradictory defences, it can undermine the credibility of the accused or it can make it seem likely (as a result of traditional stereotypes) that the accused is the type of person to have committed the crime with which he or she is charged.

Thus, the majority found this common law rule does limit the rights of the accused under s. 7. On a s. 1 analysis, Lamer C.J.C. found that the two objectives of the rule — to avoid conviction of an accused who refuses to adduce evidence of his or her insanity and to protect the public from persons who are « presently dangerous » — were of sufficient importance to warrant overriding a constitutional right. He also found, however, that the common law rule impaired s. 7 rights more than was necessary to

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18. *Dersch v. A.G. Canada*, *supra*, note 17, 142; *R. v. Garofoli*, *supra*, note 17, 181.

19. *R. v. Swain*, (1991) 63 C.C.C. (3d) 481 (S.C.C.).

20. *Id.*, 506.

accomplish these objectives. As a result, the common law rule was declared of no force or effect.

The Chief Justice went on to enunciate a new common law rule which would not infringe the rights of the accused. This rule « would allow the Crown to raise independently the issue of insanity only after the trier of fact had concluded that the accused was otherwise guilty of the offence charged<sup>21</sup> ». Thus the Crown would not be able to interfere with the conduct of the accused's defence, but would be able to intervene « after a verdict of guilty had been reached, but prior to a conviction being entered<sup>22</sup> ».

The court went on to consider the constitutionality of s. 542(2) (now s. 614(2)) which mandates the trial judge to order an accused found not guilty by reason of insanity detained in strict custody « until the pleasure of the Lieutenant-Governor of the province is known<sup>23</sup> ». There is no provision for a hearing and no discretion in the trial judge to make a different order.

The court struck down s. 542(2) because the manner in which it deprived the accused of liberty was not in accordance with the principles of fundamental justice. Apart from the procedural defect — no hearing — the provision had a substantive defect: « The detention order is automatic, without any rational standard for determining which individual insanity acquittees should be detained and which should be released<sup>24</sup>. »

It was also not saved by s. 1 because the means used to protect the public — detaining *all* insanity acquittees — was not the minimal impairment necessary to achieve that objective<sup>25</sup>.

In response to the decision in *Swain* and particularly in view of the fact that the Supreme Court allowed a six-month transitional period during which s. 542(2) would continue to be valid, Parliament recently passed an act amending the *Criminal Code* provisions with respect to insanity<sup>26</sup>. The purpose of the amendments, in the words of a Department of Justice information paper, is to

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21. *Id.*, 516.

22. *Ibid.*

23. *Id.*, 533.

24. *Id.*, 535.

25. LAMER C.J.C. stated they should be detained « no longer than necessary to determine whether they are currently dangerous due to their insanity ». *R. v. Swain, supra*, note 19, 540.

26. *An Act to amend the Criminal Code* (mental disorder), Bill C-30 (passed by the House of Commons, November 21, 1991), 3<sup>rd</sup> Session, 34<sup>th</sup> Legislature (Can.).



strengthen due process and fundamental Charter rights, thereby ensuring fair and equitable treatment of the mentally disordered offender in our society. At the same time, great care has been taken to ensure the continued protection of society against those few mentally disordered accused who are dangerous<sup>27</sup>.

The legislation is in line with recommendations made by the Law Reform Commission of Canada in its 1976 Report, *Mental Disorder in the Criminal Process*<sup>28</sup>.

The *Mental Disorder Act* seeks to achieve the dual goals of respecting the rights of the accused and protecting society by establishing a procedure for the assessment of the mental health of an accused. Assessments may be ordered not only to determine fitness to stand trial, but also to help determine an individual's mental status at the time of the offence<sup>29</sup> and to assist the court in making an appropriate disposition, such as ordering that the accused have hospital treatment<sup>30</sup>.

The legislation also implements « capping » provisions which limit the custodial periods for mentally disordered acquittees, such that it is no longer possible for them to remain in custody indefinitely<sup>31</sup>. Remands for assessment are also time-limited under the new Act<sup>32</sup>.

There is one exception to the widespread trend toward increased protection of the rights of the accused. It occurs in the area of regulatory offences. Regulatory (or public welfare) offences were first defined in the case of *Sault Ste. Marie*<sup>33</sup>. In that case, the Supreme Court defined a public welfare offence as one of strict liability, halfway between a full *mens rea* offence and an absolute liability offence, where mere commission of an act was sufficient for liability. In the case of a strict liability offence, the Crown had only to prove commission of the act. The burden then shifted to the accused, who could avoid liability only by proving, on a balance of probabilities, that he or she had acted with due diligence.

In its recent decision in *Wholesale Travel*<sup>34</sup>, the Supreme Court agreed that, to reflect the particular nature or blameworthiness of a public welfare offence, the fault element need only be negligence. In other words, the

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27. « *Mental Disorder Amendments to the Criminal Code* », Ottawa, Federal Department of Justice, September, 1991.

28. LAW REFORM COMMISSION OF CANADA, *Mental Disorder in the Criminal Process*, Report 5, Ottawa, Information Canada, 1976.

29. *Criminal Code*, s. 672.12.

30. *Id.*, s. 672.58 and 672.59.

31. *Id.*, s. 672.64 to 672.66.

32. *Id.*, s. 672.14.

33. *R. v. Corporation of The City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

34. *Wholesale Travel Group Inc. v. R.*, (1991) 84 D.L.R. (4th) 161 (S.C.C.).

accused need not have the guilty intent associated with a true *mens rea* offence in order to be liable for a public welfare or regulatory offence.

A majority of seven judges found that the reverse onus on the accused to prove due diligence on a balance of probabilities violated the guarantee of the presumption of innocence in s. 11(d) of the Charter. However, a different and narrower majority (five judges) upheld the validity of the reverse onus provision<sup>35</sup>. In upholding the reverse onus for regulatory offences, even those carrying the possibility of jail terms, a majority of the court has expressed its preference for ensuring that regulatory offences may be successfully prosecuted over a concern for the right of the accused to the benefit of a reasonable doubt. The effect of *Wholesale Travel* is that an accused may be convicted of a regulatory offence and sentenced to prison even where the trial judge is left with a reasonable doubt as to whether the accused acted with due diligence. It is left to the accused to prove due diligence on a balance of probabilities.

This decision is indicative of a growing concern about offences which harm not so much a particular individual as society itself. In the case of regulatory offences, when the court is balancing the rights of the accused with the protection of societal interests, the latter seem to be of greater concern.

## **1.2 Rights of Victims and Vulnerable Witnesses**

Alongside the trend toward increased protection of the rights of the accused, we can also discern in recent years a trend toward increased protection of the rights of victims and a greater sensitivity to other vulnerable citizens who may be caught up in the criminal justice system. As a society, we are becoming increasingly aware of the vulnerability of various groups to outmoded stereotypes and myths which have often led and continue to lead to inappropriate and even harmful treatment at the hands of the criminal justice system.

Children, the elderly, people with mental disabilities or disorders, women, Aboriginal persons, members of ethnic, cultural and religious minorities—all are susceptible to particular problems when caught up in the system, problems which require awareness, acknowledgement and a degree of flexibility and creativity on the part of the actors in the criminal justice system.

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35. Three judges found that the provision was saved by s. 1 of the Charter while two judges found that it did not violate s. 11(d) in the first place.

Some selected examples can be given which reflect the increased willingness on the part of the courts and slowly, the legislature, to deal with the problems of these vulnerable participants in the criminal justice process.

Domestic violence has emerged in recent years as a social problem of great magnitude in Canada. As a result of public awareness campaigns, attitudes toward domestic violence have begun to shift toward accepting what has always been true: spousal abuse and child abuse are crimes.

This shift in attitude is apparent in police charging policies, which have become increasingly aggressive in charging the alleged perpetrators of domestic violence, rather than treating such incidents as mere marital squabbles. Recognition of the seriousness of domestic violence has led slowly to the erosion of the myths that women who claim they are battered either are exaggerating or really like the abuse. There is a growing understanding that battered women are victims, virtual prisoners of their violent partners, prisoners in their own homes.

The change in attitude can be seen in the courts as well. The Supreme Court took the lead in the case of *R. v. Lavallee*<sup>36</sup>, where it accepted the use of expert testimony with respect to the battered wife syndrome. Madam Justice Wilson set out six principles on the basis of which such testimony is properly admitted. The thrust of these principles is to provide assistance to the factfinder, whether judge or jury, to understand the syndrome. This in turn can help to explain why self-defence may be a valid defence for a woman accused of killing her partner, even if she did not appear to be in imminent physical danger. It may explain why she did not leave her abusive partner. It may also « assist the jury in assessing the reasonableness of [the accused's] belief that killing her batterer was the only way to save her own life<sup>37</sup> ».

Another category of women who are liable to suffer once as victims of crime and a second time at the hands of a sometimes insensitive justice system are victims of sexual assault. In 1985, Parliament formally recognized that the prejudice traditionally suffered by these victims when they have testified in court was based on attitudes and stereotypes that were both sexist and irrelevant. It enacted ss. 276 and 277 of the Criminal Code to shield complainants from irrelevant and harmful cross-examination which often victimized the complainant all over again by needlessly exposing and attacking her personal life.

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36. *R. v. Lavallee*, (1990) 55 C.C.C. (3d) 97 (S.C.C.).

37. *Id.*, 125.

As discussed earlier, s. 276 was recently struck down by the Supreme Court<sup>38</sup>. In doing so, however, the majority made it clear that its rejection of s. 276 did not constitute a rejection of the principles behind its enactment:

[The] reality in 1991 is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. Although they still may inform the thinking of many, the twin myths which s. 276 sought to eradicate are just that—myths—and have no place in a rational and just system of law. It follows that the old rules which permitted evidence of sexual conduct and condoned invalid inferences from it solely for these purposes have no place in our law.<sup>39</sup>

Nevertheless, out of concern that the striking down of s. 276 would in fact lead to renewed irrelevant cross-examination of complainants in cases of sexual assault, the Minister of Justice introduced new legislation to replace s. 276 in light of the decision in *Seaboyer*<sup>40</sup>. In keeping with the need to balance the rights of the accused with those of the complainant, the Bill states that evidence of the sexual activity of the complainant is not admissible to support an inference that she is more likely to have consented to the act in question, nor may it be used to attack her credibility. The accused may, however, apply to the judge to determine whether evidence of the complainant's sexual activity may be admitted. The jury and the public would be excluded from such a hearing and the complainant could not be compelled to testify. The accused would have to prove that the evidence is of specific instances of sexual activity, is relevant to a trial issue and « has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice<sup>41</sup> ».

In addition, the Bill contains new provisions which define consent for the first time in the context of sexual offences. If the provisions are passed, it would mean, *inter alia*, that consent is not valid unless given by the person who actually engages in the sexual activity (in other words, a third party cannot consent on behalf of the complainant). A complainant who is intoxicated is incapable of giving a valid consent, as is a complainant who engages in the activity because the accused has abused a position of trust or authority<sup>42</sup>.

These amendments would once again put a certain, although limited discretion in the hands of trial judges to determine the relevance of the

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38. See discussion of *R. v. Seaboyer*, section 1.1.

39. *R. v. Seaboyer*, *supra*, note 13, 406.

40. *An Act to amend the Criminal Code* (sexual assault), Bill C-49 (First reading), 3<sup>rd</sup> Session, 34<sup>th</sup> Legislature (Can.).

41. *Id.*, s. 2, amending s. 276(2) and adding s. 276.2 to the *Criminal Code*.

42. *Id.*, s. 2, adding s. 273.1(2) to the *Criminal Code*.

complainant's sexual history. How these provisions are interpreted, if the bill is passed, will be a benchmark of how much attitudes have changed with respect to female victims of sexual assault, if at all.

In keeping with the trend toward greater understanding of the nature and effects of spousal assault has come a greater understanding of child abuse and its effects on victims. One of the effects is that it may require years for victims of child abuse to be able to recognize and come to terms with what they underwent. Only then can they summon the courage and strength to lay charges against the abuser.

One of the obstacles to the successful prosecution of such cases has been the sometimes lengthy delay between the abuse and complaints to the police resulting in charges being laid. Courts in the past have, at times, ruled that a lengthy passage of time before the laying of charges was sufficiently prejudicial to the accused to justify a stay of proceedings.

Once again, the Supreme Court has paved the way for a more informed approach in such cases. In *R. v. L. (W.K.)*<sup>43</sup>, a man was accused of sexually assaulting his daughters and stepdaughter over a period of 27 years. The first incident was alleged to have occurred in 1957; the last in 1985. The complainants first reported the alleged incidents to the police in July 1986 and the accused was charged in January 1987.

The trial judge stayed the charges at a pre-trial motion, on the basis of pre-charge delay. The issue before the Supreme Court was whether the judge had had sufficient material before him to order a stay on the basis that the accused was being denied the right to a fair trial. The judge had made findings of fact with respect to the allegations of the complainants without any evidentiary basis for those findings and without the benefit of having heard testimony from the complainants.

The Supreme Court acknowledged that an accused can claim his or her rights have been denied because of delay alone. The question, however, was whether an accused can rely solely upon the passage of time apparent on the face of the indictment to establish a violation of ss. 7 or 11(d)<sup>44</sup>. The court unanimously declared this was not sufficient: « An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment<sup>45</sup>. »

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43. *R. v. L. (W.K.)*, (1991) 64 C.C.C. (3d) 321 (S.C.C.).

44. *Id.*, 327.

45. *Id.*, 328. This point is illustrated in the recent Manitoba Queen's Bench decision, *R. v. Daley*, [1992] Man. Q. B., where Oliphant A.C.J. found that a 23-year pre-charge delay had resulted in an infringement of the accused's s. 11(d) right to a fair trial. As reported in a recent issue of *The Lawyers Weekly* (1992) 11, 10: « The judge stressed that something more than a simple effluxion of time had occurred » and referred to the failure to testify of two witnesses who could have supported the complainant's allegations.

Most significantly for the victims of child sexual abuse, the court recognized that in these types of cases, delay is to be expected, and should not necessarily operate to shield the accused.

It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse. The 1984 Report of the Committee on Sexual Offences Against Children and Youths (the Badgley Report) [...] concluded that :

[...] For three in four female victims and about nine in ten male victims, these incidents had been kept as closely guarded personal secrets.

For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting<sup>46</sup>.

In light of the above, the Supreme Court upheld the B.C. Court of Appeal's dismissal of the stay of proceedings.

Part of the trend toward greater protection of vulnerable witnesses is found in s. 486(2.1) Cr.C. This section permits complainants under 18 years old to testify outside the courtroom or from behind a screen in cases of sexual offences. Enacted as part of the 1985 reforms to the *Criminal Code*, this provision was recently the subject of a constitutional challenge. In the case of *R. v. Levogiannis*<sup>47</sup>, the accused argued that this provision was inconsistent with ss. 7 and 11(d). Morden A.C.J.O., in upholding the constitutional validity of the provision, stated that

it should be the usual practice for the judge to instruct the jury to the effect [...] that the use of the screen is a procedure that is allowed in cases of this kind by reason of the youth of the witnesses and that, since it has nothing to do with the guilt or innocence of the accused, the jury must not draw any inference of any kind from its use and, specifically, that no adverse inference should be drawn against the accused because of it.

[...] it can be said that only if juries are incapable of following the explicit instructions of the trial judge that the use of the screen has no bearing on the guilt or innocence of the accused, could the conclusion that s. 486(2.1) infringed the accused's right to a « fair hearing » be justified<sup>48</sup>.

The practicalities of implementing an order under this provision should not be exaggerated. The courts in Quebec, for instance, have access to a mobile unit which enables any courtroom to be adapted to the use of a screen.

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46. *R. v. L. (W.K.)*, *supra*, note 43, 328.

47. *R. v. Levogiannis*, (1990) 1 O.R. (3d) 351 (C.A.).

48. *Id.*, 371, 372.

It should be noted as well that the provision requiring corroboration for the unsworn testimony of children (s. 586 Cr.C.) was repealed in 1988, as were the related provisions of the *Canada Evidence Act* and the *Young Offenders Act*. The rationale for these repeals is captured, at least in part, by the reasoning of Madam Justice Wilson in a case interpreting s. 586:

Since the only evidence implicating the accused in many sexual offences against children will be the evidence of the child, imposing too restrictive a standard on their testimony may permit serious offences to go unpunished and perhaps to continue<sup>49</sup>.

By repealing s. 586, Parliament removed a serious obstacle to the conviction of child molesters.

### 1.3 Rights of Suspects and Third Parties

The trend toward greater fairness through greater protection of individual rights has been extended not only to accused persons, victims and witnesses, but to suspects and third parties as well. These protections may be the best measure of the strength of personal freedoms in a society, because they reveal what limits, if any, are placed on the state's law enforcement powers.

One of the most fundamental aspects of freedom is the right to privacy. In two recent cases, the Supreme Court of Canada has drawn the line on the power of state agencies to intrude on the privacy of citizens, relying on the right to be secure against unreasonable search and seizure. In *R. v. Duarte*<sup>50</sup>, the court considered whether « participant surveillance<sup>51</sup> » by state agencies (that is, electronic recording of a conversation where one party to the conversation agrees to the recording) constitutes an unreasonable search and seizure, contrary to s. 8 of the Charter.

Although the *Criminal Code* itself does not require prior judicial authorization for such a recording, the Supreme Court noted that the « primary value served by s. 8 is privacy<sup>52</sup> » and found that it was « unacceptable in a free society that the agencies of the state be free to use this technology at their sole discretion. The threat this would pose to privacy is wholly unacceptable<sup>53</sup>. »

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49. *R. v. B.(G.)*, (1990) 56 C.C.C. (3d) 161 (S.C.C.), 180.

50. *R. v. Duarte*, (1990) 53 C.C.C. (3d) 1 (S.C.C.).

51. *Id.*, 10.

52. *Ibid.*

53. *Id.*, 11.

The question then becomes, when does an individual in this state have a reasonable expectation of privacy ? La Forest J. for the majority stated as follows :

If privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself, a reasonable expectation of privacy would seem to demand that an individual may proceed on the assumption that the state may only violate this right by recording private communications on a clandestine basis when it has established to the satisfaction of a detached judicial officer that an offence has been or is being committed and that interception of private communications stands to afford evidence of the offence<sup>54</sup>.

Thus while the Code does not require prior judicial authorization for participant electronic surveillance, s. 8 of the Charter does.

This ruling was extended to cover surreptitious video surveillance in the case of *R. v. Wong*<sup>55</sup>. Again, the Supreme Court had to consider what constituted a « reasonable expectation of privacy ». It found that, even where a person circulated invitations and opened his hotel room to strangers, he had a reasonable expectation of privacy, because there was no « logical nexus » between these factors and the conclusion that police should have been free to videotape the proceedings at their sole discretion.

The court underlined that a search conducted without prior judicial authorization should not be validated after the fact because the surveillance revealed criminal activities. The question was whether such unauthorized video surveillance diminished the amount of privacy and freedom remaining to citizens « to a compass inconsistent with the aims of a free and open society<sup>56</sup> ». As to whether evidence obtained in violation of s. 8 should be admitted, that must be determined under s. 24(2).

The Supreme Court had occasion to examine the right to privacy of third parties in two companion cases : *C.B.C. v. Lessard* and *C.B.C. v. New Brunswick (A.G.)*<sup>57</sup>. There the issue was whether freedom of the press requires that, before issuing a warrant to the police to search media offices, a justice of the peace be satisfied that no reasonable alternative source of information exists.

Cory J. for the majority stated that because a search is always intrusive,

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54. *Id.*, 12.

55. *R. v. Wong*, (1990) 60 C.C.C. (3d) 460 (S.C.C.).

56. *Id.*, 478.

57. *Canadian Broadcasting Corporation v. Lessard*, (1991) 67 C.C.C. (3d) 517 (S.C.C.); *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)* 67 C.C.C. (3d) 544 (S.C.C.).



a justice of the peace considering a search warrant application must undertake a careful weighing of the privacy interests of individuals in a democratic society against the interests of the state in investigating and prosecuting crimes<sup>58</sup>.

While he found that it was not a constitutionally required condition for the issuance of a warrant that there be no reasonable alternative source of information, Cory J. did set out nine factors a justice of the peace should consider before issuing a search warrant for media premises and this was one of them. While these two cases are restricted on their facts to searches of the media and not other innocent third parties, the judicial guidelines they establish do seek to protect an institution which, as Cory J. put it, plays « a vital role in the functioning of a democratic society<sup>59</sup> ». One may venture to hope that when the courts consider granting search warrants against private citizens, they will weigh the privacy interests of those citizens against the interests of the state with equal care.

Recently, the Supreme Court has had occasion to pronounce on what may be viewed as another aspect of the right to silence, that is, the right to retain and instruct counsel upon arrest or detention, as protected by s. 10(b) of the Charter. In the case of *R. v. Elshaw*<sup>60</sup>, the police were called to investigate a possible incident of child molesting in a public park. Two police officers arrived on the scene and kept the suspect in a police van while obtaining statements from the children in question and the adults who had called. One officer then had a conversation with the suspect, who made a self-incriminating statement. The police had not advised him of his right to remain silent nor of his right to counsel<sup>61</sup>.

The issue before the court was whether, given the violation of s. 10(b), the self-incriminating statement was admissible under s. 24(2), that is, would its admission bring the administration of justice into disrepute. The court reviewed the four factors on the basis of which the accused attacked the admission of his statement. They were : the seriousness of the Charter violation, the circumstances of urgency or necessity, the wilful or flagrant nature of the violation and speculation that the evidence would have been obtained in any event.

Writing for the majority (six of seven judges), Iacobucci J. stated that, with respect to the seriousness of the Charter violation, although the detention was brief, it was not the *period* of detention that was important

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58. *Canadian Broadcasting Corporation v. Lessard*, *supra*, note 57, 533.

59. *Id.*, 534.

60. *R. v. Elshaw*, (1991) 67 C.C.C. (3d) 97 (S.C.C.).

61. The Crown conceded, and all the judges at all levels, with the exception of L'Heureux-Dubé J. agreed, that the accused had been detained within the meaning of the Charter, such as to trigger his s. 10(b) right.

but rather the fact that « police obtained evidence from a detained person prior to fulfilling their responsibilities under s. 10(b)<sup>62</sup> ».

As for the circumstances, the court found that while it may have been urgent to detain the suspect (as he then was), there was no urgency to question him in violation of a Charter right.

With respect to the flagrant nature of the violation, Iacobucci J. held that just because the police may have acted in good faith « will not strengthen the case for admission [of evidence] to cure an unfair trial<sup>63</sup> ». Finally, commenting on the B.C. Court of Appeal's observation that the suspect would have made the same self-incriminating statement even if police had complied with s. 10(b), Iacobucci J. stated : « To base admission on the ground that he *might* have confessed completely undermines the enshrinement of the right to counsel in the Charter<sup>64</sup>. »

The above decisions demonstrate that the judiciary at the highest level in this country is concerned with ensuring that all individuals caught up in the criminal justice system, whether as suspects, accused, victims or innocent third parties, enjoy the full benefit of the rights and freedoms promised them by the Charter.

## **2. Diversion and Decriminalization**

Frustration with the inefficiency, complexity and growing costs of the traditional court process has led to an increasing interest, over the past few years, in alternate dispute resolution or ADR, as it is commonly known. This term encompasses a broad range of dispute resolution techniques, which fall into one of the following categories : negotiation, mediation or adjudication.

Several provincial and national task forces in recent years have considered the use of ADR when reviewing ways to improve existing court structures<sup>65</sup>. The Report of the Nova Scotia Court Structure Task Force summarized what it saw as the two main reasons for this recent increased interest in ADR :

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62. *Id.*, 125.

63. *Id.*, 127.

64. *Id.*, 128.

65. BRITISH COLUMBIA JUSTICE REFORM COMMITTEE, *Access to justice : Report of the Justice Reform Committee presented to the Attorney General of B.-C.*, Victoria, Ministry of Attorney General, 1988 ; T.G. ZUBER, *Report of the Ontario Courts Inquiry*, Toronto, Ministry of the Attorney General, 1987. CANADIAN BAR ASSOCIATION, TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION, *Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution : A Canadian perspective*, Ottawa, Canadian Bar foundation, 1989.

One is philosophical : a preference for dispute resolution that emphasizes compromise rather than « winner take all » ; consensus rather than confrontation ; community values over individualism. In short, a society that is harmonious, not litigious.

[...]

The second reason [...] is the more prosaic one : the need for speedy, cheap and efficient dispute resolution mechanisms that are well adapted to the issues the parties need resolved<sup>66</sup>.

Here we see expressed the combined need for fairness and efficiency which we noted at the outset as the most evident recent trends in criminal law reform.

The growing interest in ADR is accompanied by the growth of another concept : restorative justice. While ADR is often associated with the resolution of civil disputes (although it can apply to criminal law as well), restorative justice applies specifically to the criminal justice system. Restorative justice focuses on

- 1) an expanded role for victims in the criminal justice system ;
- 2) the expansion of community participation in criminal justice through community crime prevention programs ; and
- 3) the inclusion of reparation, restitution and reconciliation as goals of criminal justice.

The Report of the CBA Task Force on ADR reviewed four potential procedures which could heighten ADR in the context of criminal cases : pre-trial discovery ; pre-trial conferences ; plea bargaining ; and diversion.

Effective pre-trial discovery, or disclosure, discussed above as a right of the accused, can also be a means of narrowing the issues and may even result in a greater number of guilty pleas. In either case, justice is served and court time is saved. The Law Reform Commission of Canada advocated amending the Criminal Code to ensure a formal pre-trial discovery process as early as 1974<sup>67</sup>. Its recommendation was echoed by the Report of the Royal Commission on the Donald Marshall Jr. Prosecution. By mandating Crown disclosure in *Stinchcombe*<sup>68</sup>, the Supreme Court of Canada achieved, at least in part, what Parliament to date has not.

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66. *Report of the Nova Scotia Court Structure Task Force*, Halifax, The Task Force, 1991, p. 381.

67. LAW REFORM COMMISSION OF CANADA, *Discovery*, Working Paper 4, Ottawa, The Commission, 1974.

68. *R. v. Stinchcombe*, *supra*, note 9.

With respect to plea bargaining, the Law Reform Commission of Canada devoted a Working Paper to this topic three years ago<sup>69</sup>. It recommended guidelines which would make the process of negotiating a plea agreement more open and fair. For example, it recommended that judicial officers before whom an accused is to appear should not offer any inducement to the accused to plead guilty. It also recommended that accused persons in similar circumstances be given the same opportunities to engage in plea discussions. The view of victims should be taken into account before a prosecutor concludes a plea agreement. A prosecutor and an accused who have concluded a plea agreement should disclose the substance of and reasons for that agreement in open court<sup>70</sup>. While there have been no legislative enactments to mandate that these guidelines are followed, it is to be hoped that such recommendations encourage greater fairness and openness in the negotiation of plea agreements.

Diversion is a concept that the Law Reform Commission of Canada explored in the early and mid-70s. It is of more than passing interest to note that the ideas which emerged from its 1975 paper *Studies in Diversion*<sup>71</sup>—emphasis on restoration of community harmony through non-adversary processes, forging links between offender, victim and community, focus on enhancing integration rather than isolation of the offender—form the backbone of Aboriginal justice systems. The close parallel between traditional Aboriginal methods of maintaining social order and harmony and emerging mainstream notions of ADR is striking<sup>72</sup>.

It is more than coincidence that many of the recommendations the Law Reform Commission of Canada made in its most recent report to Parliament, *Aboriginal Peoples and Criminal Justice*<sup>73</sup>, incorporate various forms of ADR. While expressed in the context of a report on how the system can be improved with respect to Aboriginal people, these recommendations would have an equally beneficial effect if applied across the board to all offenders. For example, Recommendation 13(5) stated that: «The *Criminal Code* should contain a counterpart to the «alternative

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69. LAW REFORM COMMISSION OF CANADA, *Plea Discussions and Agreements*, Working Paper 60, Ottawa, The Commission, 1989.

70. *Id.*, recommendations 6, 8, 11, 12, pp. 68-69.

71. LAW REFORM COMMISSION OF CANADA, *Diversion*, Working Paper 7, Ottawa, The Commission, 1975.

72. For a detailed discussion, see M. JACKSON, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities*, unpublished study paper for Law Reform Commission of Canada, May, 1991 (to be published in Spring issue of *U.B.C.L. Rev.*).

73. LAW REFORM COMMISSION OF CANADA, *Aboriginal Peoples and Criminal Justice*, Report 34, Ottawa, The Commission, 1991.

measures » provisions in the *Young Offenders Act*, for disposing of and diverting cases against adult Aboriginal offenders<sup>74</sup>. »

The Commission went on to say : « Indeed, in our view such alternative measures should be available in all criminal cases<sup>75</sup>. »

The Commission was pursuing its work in the area of ADR in a projected Report to Parliament (*diversion : A Fresh Look at Alternative Dispute Resolution Mechanisms*). The Report was seeking to analyze existing alternate dispute resolution mechanisms and identify those that are capable of effective implementation in our system of criminal justice.

On a more particularized level, the Law Reform Commission of Canada, prior to its abolition, was pursuing a joint project on drug laws and enforcement policies with the Canadian Centre for Drug Abuse. This project was examining alternatives to current enforcement techniques which may ensure better compliance with drug laws. The philosophy underlying the laws as well was also being reviewed. Such projects could have served as models for the integration of alternative dispute resolution mechanisms in the criminal justice system.

It would be wrong to leave the impression that the government has not introduced legislation which promotes diversion and decriminalization. Bill C-46, *An Act Respecting Contraventions of Federal Enactments*, is a step in this direction. The purposes of the Act, as stated in s. 4, are :

- (a) to provide a procedure for the prosecution of contraventions that reflects the distinction between criminal offences and regulatory offences and that is in addition to the procedures set out in the *Criminal Code* for the prosecution of contraventions and other offences ; and
- (b) to alter or abolish the consequences in law of being convicted of a contravention, in light of that distinction<sup>76</sup>.

The motivation behind introduction of the ticketing scheme proposed in this legislation may be found in the increasing cost of justice in these times of financial restraint. Those involved in the criminal justice system are more willing to consider and to implement alternatives to traditional methods. As the saying goes, necessity is the mother of invention.

If enacted, the *Contraventions Act* will greatly facilitate the prosecution of regulatory offences by imposing a much less formal and time-consuming process to deal with violations than is applied in the case of criminal

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74. *Id.*, 70.

75. *Ibid.*

76. *An Act Respecting Contraventions of Federal Enactments*, (First Reading), 3<sup>rd</sup> Session, 34<sup>th</sup> Legislature (Can.).

offences. This federal ticketing scheme draws on recommendations made by the Law Reform Commission in its 1986 Working Paper, *Classification of Offences*<sup>77</sup>. There the Commission argued in favour of a separate régime outside the *Criminal Code* which would govern the prosecution of regulatory offences.

Provinces like Quebec and Ontario have already implemented a simplified procedure for the prosecution of provincial offences. Moving away from the cumbersome procedure of Part XXVII of the *Criminal Code* (Summary Convictions), Quebec has recently enacted a *Code of Penal Procedure*<sup>78</sup> containing an expeditious and cost-effective ticketing procedure. It is to be hoped that the federal government will eventually extend the « decriminalized » procedure of the *Contraventions Act* to all summary conviction offences under the *Criminal Code*.

### 3. Streamlining the Process

#### 3.1 Court Reform

The concept of a unified criminal court is one which has gained increasing momentum over the last few years. Several provinces have examined their court structures and concluded that a move toward unification is desirable. In some cases, such as that of Ontario and British Columbia, recent legislation has succeeded in eliminating one tier of the court structure.

The *British Columbia Courts Amendment Act*<sup>79</sup>, which came into force on July 1, 1990, gives effect to a merger of the County Court with the Supreme Court which has now become, in British Columbia, a court of original jurisdiction in both civil and criminal cases. The *Ontario Courts of Justice Amendment Act, 1989*<sup>80</sup>, which came into force on September 1, 1990, reduces Ontario's court structure from a three-tiered to a two-tiered system.

These Acts are in keeping with the spirit of recommendations made by the Law Reform Commission of Canada in its Working Paper 59, *Toward a Unified Criminal Court*<sup>81</sup>, which advocated the creation in each province of

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77. LAW REFORM COMMISSION OF CANADA, *Classification of Offences*, Working Paper 54, Ottawa, The Commission, 1986.

78. *Code of Penal Procedure*, R.S.Q., c. C-25.1.

79. *British Columbia Courts Amendment Act*, S.C., 1990, c. 16.

80. *Courts of Justice Amendment Act*, S.O., 1989, c. 55.

81. LAW REFORM COMMISSION OF CANADA, *Toward a Unified Criminal Court*, Working Paper 59, Ottawa, The Commission, 1989.

a single court or court division to deal with criminal matters. As an interim measure, the Commission recommended that unification be accomplished in stages, by reducing by one level the number of courts with criminal jurisdiction in provinces which presently have three levels. This is what Ontario and British Columbia have done. The Commission believed that a unified criminal court would address three problems found in a multi-level court system : the complexity of the system, delays in the judicial process and the apparent hierarchy of courts.

In Quebec, which has always had only two levels of court, recent restructuring has had the effect of merging all provincial courts into one<sup>82</sup>.

Nova Scotia's review of its court structure is the most recent of such provincial undertakings. The Nova Scotia Court Structure Task Force recommended the merger of the County Courts with the Trial Division of the Nova Scotia Supreme Court. In addition, in considering the merits of a unified criminal court, the Task Force recommended the implementation of a pilot project. It concluded :

While we do not embrace the unified criminal court uncritically, it has enormous potential to do good and it is the most promising proposal abroad today. The test will be the practical experience of dealing with appeals, reviews and routine matters<sup>83</sup>.

Not all groups favour the implementation of a unified criminal court. The Canadian Bar Association Task Force Report—*Court Reform in Canada*<sup>84</sup>—concluded that « the move to a unified criminal court is not likely to have sufficient good effects to justify the exercise<sup>85</sup> ». However, if governments were to implement unified criminal courts, the CBA Task Force, like its counterpart in Nova Scotia, recommended the implementation and professional assessment of a pilot project or projects.

### 3.2 Caseflow Management

Like the issue of a unified criminal court, caseflow management has been discussed in numerous studies by provincial and professional association task forces. This term describes the « effective management of the flow of cases through the courts<sup>86</sup> ». It has also been defined as « supervision or management of the time and events involved in the movement of a

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82. *Courts of Justice Act*, R.S.Q., c. T-16.

83. *Report of the Nova Scotia Court Structure Task Force*, *supra*, note 66, p. 137.

84. *Report of the Canadian Bar Association Task Force on Court Reform in Canada*, Ottawa, The Canadian Bar Association, 1991.

85. *Id.*, p. 113.

86. *Report of the Nova Scotia Court Structure Task Force*, *supra*, note 66, p. 318.

case through the court system from the point of initiation to disposition, regardless of the type of disposition<sup>87</sup> ». It is a way of reducing or eliminating a backlog of cases, particularly at the trial level. If successful, it is a way of ensuring trials within a reasonable time.

The major requirements for active supervision of the progress of cases may be listed as :

- 1) early and continuous control of cases ;
- 2) time standards governing the case as a whole and intermediate steps in the process ;
- 3) constant monitoring and measuring of compliance with the time standards ; and
- 4) firm dates for trial and intermediate steps, through strict control of adjournments.

In determining who should be responsible for criminal cases flowing through the courts as quickly and efficiently as possible, there is general agreement that this is a role best played by the judiciary for it is judges who control abuse of process. As Justice Zuber commented in his report :

[Those] accused of crime and their counsel are often disinterested in trial within a reasonable time. Delay is perceived not as a factor which will impair the ability of the accused to present a defence but rather a factor which will erode the case for the prosecution. It is therefore most often the defence which seeks delay. Courts should no more tolerate delay by the accused than by the prosecution<sup>88</sup>.

Placing the burden on the Crown is not a better solution, as the Crown will be hampered by financial restraints and personnel shortages. In a working paper called *Trial Within A Reasonable Time* that would have been published shortly<sup>89</sup>, the Law Reform Commission of Canada states that the « fundamental premise of caseflow management is that judges must accept responsibility for the active supervision and management of every case, from filing to disposition<sup>90</sup> ».

In addition to caseflow management, which is an administrative approach to the problem of delay, the Law Reform Commission has recommended the enactment of statutory limitation periods in the criminal justice process. Again, it would be up to the judiciary to enforce the limitation

87. M. SOLOMON et D.K. SOMERLOT, *Caseflow Management in the Trial Court — Now and for the Future*, Chicago, American Bar Association, 1987, p. 3.

88. *Report of the Ontario Courts Inquiry*, *supra*, note 65, p. 73.

89. LAW REFORM COMMISSION OF CANADA, *Trial Within a Reasonable Time*, Working Paper 67, unpublished document, Ottawa. (The Law Reform Commission was abolished before the paper could be published.)

90. *Id.*, p. 30.



periods. This legislative approach is intended to be complementary to the administrative approach already described. The limitation periods would begin only after charges have been laid and would end at the commencement of a trial.

The Supreme Court decision in *R. v. Askov*<sup>91</sup> provided additional impetus for court administrators to establish more efficient systems of caseload management if they did not wish to see hundreds of criminal cases dismissed due to systemic delay.

*Askov* established that there were four factors to be considered in assessing whether there has been unreasonable delay contrary to s. 11(b) of the Charter: the length of the delay, explanation for the delay, waiver and prejudice to the accused. Systemic delay is part of the delay attributable to the Crown and therefore necessarily counts in favour of the accused. Although difficult to assess with accuracy, it can result and has resulted in serious charges being stayed.

In making its findings, a majority of the court held that s. 11(b) protects not only the right of the accused to trial within a reasonable time (its primary aim), but also protects an implicit societal or community interest. Cory J. describes this interest as « ensuring that those who transgress the law are brought to trial and dealt with according to the law » and also, seeing that « those individuals on trial [are] treated fairly and justly<sup>92</sup> ».

This reasoning exemplifies how fairness and efficiency not only can but must go hand in hand.

### 3.3 Simplification of Procedure

Another way in which the criminal justice process may be streamlined is through the simplification of procedure. The Law Reform Commission of Canada has recommended revisions to the procedures for election, deemed election and re-election<sup>93</sup>. The proposed new scheme would simplify the election and re-election process while substantially reducing the scope for improper manipulation of these procedures, without sacrificing procedural fairness or legitimate advantages<sup>94</sup>.

Criminal procedure may also be streamlined through use of pre-trial motions and pre-hearing conferences. The Commission has recommended

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91. *R. v. Askov*, (1991) 59 C.C.C. (3d) 449 (S.C.C.).

92. *Id.*, 474.

93. See Chapter III of the unpublished paper of LAW REFORM COMMISSION OF CANADA, *supra*, note 89.

94. *Id.*, p. 132.

that a general statutory provision be enacted authorizing pre-trial motions, to clear up any ambiguity remaining after the decision in *R. v. Chabot*<sup>95</sup>, which left it in doubt as to whether a court has jurisdiction to deal with pre-trial motions where an indictment has not been preferred. Such motions could then dispose of all issues which can conveniently be dealt with in advance of trial and in the absence of the jury, and which do not depend on the evidence to be presented in the case proper<sup>96</sup>.

Since 1989, the *Criminal Code* has provided for the holding of pre-hearing conferences, at the initiative of any of the parties, on consent. In the case of jury trials, such conferences are mandatory (s. 625.1). Pre-hearing conferences could be an appropriate forum for disclosure, for plea negotiation, for arriving at an agreed statement of facts or the resolution of other issues not seriously in dispute, to cite a few examples<sup>97</sup>.

#### 4. Greater Use of Technology

The increasing use of new technology in recent years has contributed both to greater efficiency and greater fairness in the criminal justice system. Greater efficiency because reliance on techniques such as telewarrants lessens the use of court time for certain procedures. Greater fairness because the use of technology may allow courts to rely to a greater extent on objective evidence, such as DNA testing or videotapes of the alleged criminal activities, as opposed to the testimony of witnesses or police officers.

##### 4.1 Police

The police may use technology to assist in their investigations. Cameras and video surveillance can greatly enhance the accuracy and reliability of police reports of criminal activity. Video cameras such as those commonly used by banks for the purpose of recording robberies have been installed in public places with a high incidence of crime and hooked up to police stations where officers can monitor them. The Montreal police use this system in certain subway stations<sup>98</sup>.

The police may also use video cameras to record investigations of suspects or accused persons. This technique was pioneered in Canada in a pilot project conducted by the Halton Regional Police, based on recom-

95. *R. v. Chabot*, (1981) 55 C.C.C. (2d) 385 (S.C.C.).

96. LAW REFORM COMMISSION OF CANADA, *supra*, note 89, p. 156.

97. *Id.*, Chapter 4, III(B).

98. G. LÉTOURNEAU et A. MORIN, « Technologie nouvelle et droit pénal canadien », (1989) 49 *R. du B.* 821-827.

mendations made by the Law Reform Commission of Canada<sup>99</sup>. Evaluation of the project revealed that it resulted in appreciable savings of court time, as an accused who had made an incriminating statement was more likely to plead guilty<sup>100</sup>. A similar pilot project in New Zealand met with equal success and nation-wide implementation is now planned<sup>101</sup>.

Section 487.1 of the *Criminal Code* permits a peace officer to apply for a warrant by submitting an information on oath by telephone or other means of telecommunication where «it would be impracticable to appear personally before a justice to make application<sup>102</sup>». The oath itself may also be administered by telephone or other means of telecommunication. Telewarrants are therefore an effective way of expediting the issuance of warrants to peace officers in remote areas or on the evenings or weekends, when courts are not sitting. A designated duty judge need only be accessible by telephone to be able to issue telewarrants.

Police use of technology may also assist victims by alleviating the burden of testimony. Section 715.1 of the *Criminal Code* permits victims of sexual offences who were under 18 at the time of the alleged offence to describe the acts complained of on videotape. If the videotape was made within a reasonable time after the alleged offence, the complainant may simply adopt the contents of the videotape while testifying. We should point out, however, that this section of the Code has been held to violate ss. 7 and 11(d) of the Charter and therefore to be of no force and effect<sup>103</sup>.

#### 4.2 Courts

Technology may of course be used to promote the efficiency of court proceedings. For instance, the accused should be permitted to appear and to plead by telephone or other means of communication, where the court and the prosecutor consent. This was the recommendation of the Law

99. LAW REFORM COMMISSION OF CANADA, *Questioning Suspects*, Working Paper 32, Ottawa, Minister of Supply and Services, 1984.

100. A. GRANT, *The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, An Evaluation*, First Interim Report, Ottawa, Law Reform Commission of Canada, 1985; Final Report, Ottawa, Law Reform Commission of Canada 1987.

101. *A Report on The New Zealand Video Interview Project*, Wellington, New Zealand Police National Headquarters, 1991.

102. *Criminal Code*, s. 487.1.

103. *R. v. Thompson*, (1989) 68 C.R. (3d) 328 (Alta. Q.B.); also, *R. v. Christensen*, (1989) 8 W.C.B. (2d) 13 (Ont. Dist. Ct.); *R. v. Laramée*, (1991) 65 C.C.C. (3d) 465 (Man. C.A.).

Reform Commission of Canada in a recent working paper and a report<sup>104</sup>. There has already been at least one instance of pleading by telephone: a person imprisoned in Quebec registered a guilty plea by telephone to a court in New Jersey and received his sentence the same way<sup>105</sup>.

The phrase « other means of communication » in section 487.1 of the *Criminal Code* and the Law Reform Commission documents clearly includes use of the facsimile, or fax machine. Several state courts in the United States already allow for the filing of court documents by fax. This procedure has proven very beneficial for rural judicial districts, where judges have jurisdiction over a large and sparsely populated geographic territory<sup>106</sup>. There is no doubt that Canada could benefit from similar use of the fax machine.

Technology is not solely a vehicle for efficiency. It may also promote fairness. For instance, technology may be used to alleviate the burden on young victims of sexual offences by affording the possibility of testifying by closed-circuit television. Complainants in this category may testify outside the courtroom so long as the accused, the judge and the jury are able to watch the testimony on closed-circuit television<sup>107</sup>.

The use of cameras in the courtroom is another example of how the use of technology may advance one of the basic principles underlying our criminal justice system — openness. This aspect of courtroom procedure is governed by provincial legislation like the *Judicature Act* of Ontario which has prohibited cameras in court buildings since 1984<sup>108</sup>. Canadian courtrooms are a long way from being the site for spectacles such as the William Kennedy Smith trial.

104. LAW REFORM COMMISSION OF CANADA, *Double Jeopardy, Pleas and Verdicts*, Working Paper 63, Ottawa, The Commission, 1991, recommendation 16, p. 72 (re appearance) and recommendation 21, p. 80 (re pleading); LAW REFORM COMMISSION OF CANADA, *Aboriginal Peoples and Criminal Justice*, *supra*, note 73, recommendation 11(5), p. 58 (re appearance).

105. M.C. AUGER, « Première mondiale, jugé par téléphone », *Le Devoir*, 15 mars 1989, pp. A-1 et A-10.

106. S. KOENIG, *Courts in the Fax Lane: The Use of Facsimile Technology by State Courts*, San Francisco, National Center for State Courts, 1990.

107. *Criminal Code*, ss. 486(2.1) and (2.2).

108. *R. v. Squires* (n° 1), (1985) 25 C.C.C. (3d) 32 (C.P. Ont.); *R. v. Squires* (n° 2), (1985) 25 C.C.C. (3d) 44 (C.P. Ont.); *R. v. Squires* (1989), 69 C.R. (3d) 337 (C. Dist. Ont.). The appeal by a former C.B.C. reporter for filming a witness leaving an Ottawa courtroom, was pleaded before the Ontario Court of Appeal on February 24, 1992. The court stated that it could rule on the ban on cameras in court buildings without ruling on the use of cameras in proceeding rooms. The decision has not been rendered yet.

A final example of the use of technology to aid the criminal justice process is the development of DNA fingerprinting. The use of biological science to identify the unique genetic code of a human being from samples of blood or other bodily fluids has increased immeasurably the accuracy and reliability of scientific identification techniques. DNA typing was first applied in Canada in 1989<sup>109</sup>. More recently, it was the cornerstone of the case against Allan Legere, the convicted suspect who escaped police custody and committed further murders while eluding captivity in New Brunswick.

## 5. Conclusion

The criminal law reform trends discussed above promote both fairness and efficiency, demonstrating that these two values need not be incompatible. As the Law Reform Commission stated in its recent Research Program :

Greater fairness, efficiency and accessibility can be conflicting concepts if any one of these values is unduly promoted at the expense of others. There is a delicate balance to be achieved among these three complementary notions. In a time of financial restraint, where one has to do more with less, the pursuit of these objectives is more than challenging ; it has become an imperative<sup>110</sup>.

A system is by definition a structure designed to accomplish some function with efficiency. The pursuit of justice may be defined as the pursuit of fair treatment. A justice system, by its very nature therefore, must seek to achieve both fairness and efficiency. To have either an inefficient system of justice or an efficient system which produces injustice is neither desirable nor acceptable.

Recent trends in criminal law reform indicate that there is a growing awareness in the judicial, legislative and administrative branches of the need to pursue both fairness and efficiency simultaneously. The challenge is to strike a healthy balance between these two essential values.

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109. *R. v. McNally*, as reported in the article « DNA Fingerprinting », (1989) 8 *The Lawyers Weekly* 1.

110. LAW REFORM COMMISSION OF CANADA, *New Research Program*, unpublished document, Ottawa, 1992, p. 8.